No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STEVEN LOFTON, *et al.*,

Petitioners,

—v.—

SECRETARY OF THE FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES, *et al.*,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Did the Eleventh Circuit correctly hold that the Fourteenth Amendment permits a state categorically to exclude gay people and no one else from its case-by-case evaluation process for deciding who may adopt children into permanent homes?

LIST OF PARTIES

Petitioners are Steven Lofton; Douglas E. Houghton, Jr.; John Doe and John Roe, minor children, by and through their next friend, Timothy Arcaro; Wayne LaRue Smith; and Daniel Skahen. Angela Gilmore is named as a plaintiff in the opinion of the Eleventh Circuit but was dismissed as a party in the District Court and is not a petitioner here.

Respondents are the Secretary of the Florida Department of Children and Families and the District Administrator of District XI of the Florida Department of Children and Families.[1] Charlie Crist, Attorney General of the State of Florida, and Robert Pappas, District Administrator of District X of the Florida Department of Children and Families, are named as defendants in the opinion of the Eleventh Circuit but were dismissed as parties in the District Court and are not respondents here.

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[1] The opinions of the Eleventh Circuit identified the Department as the Department of Children and Family Services.

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OPINIONS AND ORDERS BELOW

The decision of the District Court granting summary judgment to the defendants and dismissing plaintiffs' complaint was entered on August 30, 2001. The court's opinion is published as *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001), and is reprinted in the Appendix ("App.") at 113a.

The Eleventh Circuit decision affirming the District Court was entered on January 28, 2004, is published as *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004), and is reprinted at App. 1a.

On July 21, 2004, the Eleventh Circuit denied plaintiffs' petition for rehearing *en banc* by an evenly divided court. The denial of the petition, along with two dissenting opinions and a special concurrence, are published as *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 377 F.3d 1275 (11th Cir. 2004), and reprinted at App. 41a.

JURISDICTION

The Eleventh Circuit's decision affirming the District Court's grant of final summary judgment was entered on January 28, 2004. On July 21, 2004, that court entered an order denying plaintiffs' petition for rehearing *en banc*.[2] This

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[2] The petition was denied by a vote of 6-6. One of the votes against *en banc* review was cast by the Hon. William H. Pryor, Jr. The Eleventh Circuit is considering in another case whether Judge Pryor was properly named to the Court as a recess appointment during an intra-session adjournment of Congress, and thus, whether he has the authority to sit as a judge on that Court. *Stephens v. Evans*, No. 02-16424 (11th Cir.). Because the issue posed in *Stephens* is also posed in this case and the six votes in favor of rehearing would be a majority of the Court if it determines that it has only eleven judges, plaintiffs moved for a stay of the issuance of the mandate by the Court of Appeals pending its decision in *Stephens* regarding the validity of the recess appointment of Judge Pryor. The Eleventh Circuit granted that motion

Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fla. Stat. § 63.042 provides:

> Who may be adopted; who may adopt.
> (1) Any person, a minor or an adult, may be adopted.
> (2) The following persons may adopt:
> a) A husband and wife jointly;
> b) An unmarried adult; or
> c) A married person without the other spouse joining as a petitioner, if the person to be adopted is not his or her spouse, and if:
> 1. The other spouse is a parent of the person to be adopted and consents to the adoption; or
> 2. The failure of the other spouse to join in the petition or to consent to the adoption is excused by the court for good cause shown or in the best

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on August 4, 2004. Because the stay of the mandate does not toll the time for filing a petition for *certiorari* under the Supreme Court rules, plaintiffs have filed this petition.

The issue of the validity of Judge Pryor's recess appointment is also pending before this Court in a petition for *certiorari*. *Miller v. United States*, No. 04-38. For the same reason petitioners asked for a stay of the mandate in the Eleventh Circuit, if the Court grants review in *Miller*, it should hold this petition until it resolves the validity of the appointment. This issue is fairly encompassed within the question presented because if Judge Pryor was not constitutionally authorized to sit on the Court of Appeals, plaintiffs' rehearing petition would have been granted and the Panel decision would have been vacated.

interest of the child.

(3) No person eligible to adopt under this statute may adopt if that person is a homosexual.

(4) No person eligible under this section shall be prohibited from adopting solely because such person possesses a physical disability or handicap, unless it is determined by the court or adoption entity that such disability or handicap renders such person incapable of serving as an effective parent.

STATEMENT OF THE CASE

The challenged statute and Florida's child welfare system

Florida, alone among the states, categorically disqualifies eligible lesbians and gay men—and only lesbians and gay men—from being considered as potential adoptive parents.[3] Fla. Stat. § 63.042(3) says:

> No person eligible to adopt under this statute may adopt if that person is a homosexual.

Florida's system of individualized evaluation of adoption applicants in light of children's needs. The blanket exclusion of gay people is an aberration within Florida adoption law, which otherwise provides that all adoption applicants are evaluated on a case-by-case basis. *See* Fla. Stat., ch. 63; § 63.125. This individualized evaluation process aims to find adoptive parents who are able to meet the unique needs of each child who is waiting to be adopted, *see* Fla. Admin. Code §§ 65C-16.002, 65C-16.004, 65C-16.005, and, thus, to

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[3] No other state categorically excludes gay people from adopting. One state, Mississippi, statutorily prohibits adoption by same-sex couples, Miss. Code § 93-17-3(2), and in 1999, Arkansas enacted a regulation that excludes families with gay household members from serving as foster parents, but not from adopting, Arkansas Minimum Licensing Standards for Child Welfare Agencies § 200.3.2.

provide a "permanent family" for as many children as possible, *see* Fla. Stat. § 409.166(1) ("It is the intent of the Legislature to protect and promote every child's right to the security and stability of a permanent family home.").

Florida does not exclude unmarried people from adopting. In fact, the adoption law expressly permits single people to adopt, Fla. Stat. § 63.042(2)(b), and the State has no preference for married applicants. *See* Fla. Admin. Code § 65C-16.005(6)(e).[4] Florida actively *recruits* single individuals to adopt, and 25 percent of the adoptions the State approves are to single people. Record 145 (Deposition of Carol Hutchison ("Hutchison Dep."), at 118-19); App. 150a, ¶ 24. Single applicants are not excluded from adopting if they do not intend to marry. Record 145 (Hutchison Dep., at 113). Florida's Department of Children and Families recognizes that for certain children, single parents are preferred, even over available married couples. Record 145 (Hutchison Dep., at 53-54, 109-11, 115).

Nor does Florida categorically exclude adoption applicants who are disabled. State law prohibits the exclusion of disabled individuals unless there is a determination that the disability "renders such person incapable of serving as an effective parent." Fla. Stat. § 63.042(4); *see also* Fla. Admin. Code § 65C-16.005(9)(1) (applicants with serious or chronic medical conditions that compromise or could compromise the ability to care for a child are subject to special review).

Florida considers adoption applications from people who have previously failed as adoptive parents. *See* Fla. Admin. Code § 65C-16.005(3)(d) (applicants who have experienced

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[4] In 2003, Florida repealed a regulation that had expressed a preference for married couples over single parent placements unless a single parent was deemed best for a particular child's needs. Fla. Admin. Code § 65C-16.005(6)(f) (2002).

adoption dissolution or disruption must be "carefully evaluated"). Nor does it bar applicants about whom the State has had concerns as foster parents. *See id.* § 65C-16.005(9)(4) (such applicants must undergo special review).

Florida does not even categorically disqualify those with characteristics it knows frequently pose a serious threat to children, such as substance abusers and people with a history of domestic violence. App. 147a-148a, ¶¶ 1, 3; App. 134a, ¶¶ 1, 2. Parental substance abuse can be so damaging to children that it plays a role in over half of the cases in which children are removed from their families in Florida. App. 134a, ¶ 2 (57% of cases). Yet, individuals with a history of substance abuse can apply to adopt and be individually considered for their suitability to care for children. App. 147a-148a, ¶ 1. The same is true of people who have committed acts of child abuse. App. 148a, ¶ 3. Recognizing the danger of this latter group, Florida requires special review of applicants who have previous verified findings of abuse, neglect or abandonment, Fla. Admin. Code § 65C-16.005(9), but does not automatically disqualify them.[5]

Instead of using blanket exclusions, Florida "carefully observe[s], screen[s] and evalute[s]" each applicant for his or her ability to meet the "physical, emotional, social, educational and financial needs of a child." Fla. Admin. Code § 65C-16.005(2). Adoption applicants are subjected to a home study, a reference check, and criminal records and child abuse registry checks. Fla. Admin. Code §§ 65C-16.005(2), 65C-16.005(3)(o), 65C-16.007. Through this process, the

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[5] Individuals convicted of certain violent felonies are barred from adopting children who are in State custody. Fla. Stat. § 435.045. This provision was enacted to comply with the federal Adoption and Safe Families Act of 1997 (Public Law 105-89). Record 131 (Deposition of Linda Radigan, at 94-95). But those felons are not categorically excluded from adopting other children. *See* Fla. Stat., ch. 63; Fla. Admin. Code §§ 65C-16.001 *et seq.*

State excludes individuals it deems incapable of meeting a child's needs. Fla. Admin. Code § 65C-16.005; App. 148a, ¶¶ 2) (State excludes substance and domestic abusers where they are determined to pose a threat to children).

The singular exception from this system of case-by-case evaluations is made for gay people. Regardless of individual ability, family ties to the child or any other circumstances, the State conclusively treats all members of this class as inherently unfit to adopt. But at the same time, Florida demonstrates its trust in the parenting ability of countless lesbians and gay men by placing children in foster care—including in what the State calls long-term "de facto permanent" placements—with gay people. App. 148a, ¶¶ 6-8; 150a, ¶¶ 29, 31; Record 24 (Defendants' Motion to Dismiss, at 10). Florida likewise places children in the care of lesbians and gay men in unsupervised guardianships. App. 148a, ¶¶ 9-11. In contrast with its experience with substance abusers and child abusers, the State does not know of a single child who is in foster care because of any harm associated with the lesbian or gay orientation of parents or caregivers. App. 148a, ¶ 5.

The history of the challenged law. To understand why Florida would disqualify gay people, whom it knows pose no threat to children, while individually evaluating applications from the most dangerous people, one need look only at the legislative history of the statute.

The law was enacted in 1977. Dade County had just passed one of the first sexual orientation anti-discrimination ordinances in the country. The ordinance was met with an intense repeal campaign, which included a crusade led by entertainer Anita Bryant, that demonized gay people as a public menace. Against this backdrop, a bill to bar adoption by gay people was introduced and passed in the Florida legislature. *See* App. 91a-94a (Barkett, J., dissenting) (chronicling the legislative history of the challenged statute).

The political environment and the absence of any real discussion about children in the legislative debates (*id.*) make it clear that this law was enacted not to promote children's welfare, but to disadvantage gay people. As the law's sponsor, Sen. Curtis Peterson, put it, the purpose of the bill was to send a message to lesbians and gay men that "[w]e're really tired of you. We wish you'd go back into the closet." App. 136a, ¶ 13.

The effect of the exclusion on children. The Florida legislature took aim at gay adults, but those who have been most affected by this law are orphaned children.

For some children, the exclusion of a large class of eligible adults from the adoptive pool means they will be denied the possibility of ever being adopted into a permanent family. Others will spend even more of their childhood waiting. At the time this case was dismissed by the District Court, there were over 3,400 children in Florida eligible for adoption for whom there were no adoptive parents available. App. 149a, ¶ 15. Many wait for years: 36% of children in State custody in Florida are in foster care for more than four years; almost 80% wait more than two years. App. 149a, ¶ 16.

The Florida legislature is very much aware that it is in dire need of more adoptive parents for the thousands of children in State custody. *See* Fla. Stat. §§ 409.166 (difficult to find adoptive homes for older children, disabled children, and children of certain races); 409.1673(1)(a)(5) ("[t]here is a lack of permanent adoptive homes for older and disabled children."); 409.1755(2) ("[a] black child is more likely to . . . remain in permanent custody of the state because he or she is less likely to be adopted."). Florida has set up several programs to increase the pool of potential adoptive parents. *See, e.g.*, Fla. Stat. §§ 409.166 (subsidies for adopting "special needs" children"); 409.167 (statewide adoption exchange);

409.1755 (recruitment of adoptive parents for African American children); 409.401 (Interstate Compact on the Placement of Children to facilitate interstate adoption). Yet thousands of children still wait.

For other Florida children, the disqualification of eligible lesbian and gay applicants means they cannot be adopted by the persons best suited to become their parents. This is true, for example, for children who are already being raised by lesbian and gay foster parents, guardians, relatives and other caregivers. While these children, like plaintiffs John Doe and John Roe, are luckier than some because they have families, the law denies them the security that being adopted provides—the permanency the State recognizes is so important to children.[6] The experiences of John Doe and John Roe illustrate how the challenged law frustrates the State's goal of giving children a "permanent family life," Fla. Stat. § 63.022 (3), and in some cases, puts them at risk of being torn away from their families.

The plaintiff families

The Lofton family. Plaintiff John Roe is 13 years old. Plaintiff Steven Lofton and his partner of 20 years, Roger Croteau, have been raising him as their son since he was placed in foster care with Lofton as an infant.

Steven Lofton became a licensed foster parent in 1988 to take care of HIV+ infants who were abandoned. Over the years, he has been a foster parent to eight children who either had HIV or AIDS. Because caring for children with HIV is so demanding, the State of Florida insisted that Lofton give up

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[6] *See* App. 149a, ¶ 14 ("A primary purpose of Florida's adoption law is to provide all children who can benefit by it a permanent family life."); Fla. Stat. § 409.145 (under Florida law, a "permanent placement" is the goal for every child who cannot be reunified with birth parents); Fla. Stat. §§ 63.022(3); 39.001(3)(b).

his career as a pediatric AIDS nurse and devote full time to the children. App. 150a, ¶ 30; App. 142a.

Although some of the children Lofton parented were with him in temporary placements, four, all of whom he took in as infants, were not. Franke and Tracy are now 16 and 17 and still part of Lofton's family.[7] Ginger died of AIDS in 1994, when she was six. And then there is John. When John came home to live with Steven and Roger, he was a very sick baby; he tested positive for HIV and he had both cocaine and marijuana in his system. John's tests for HIV later turned negative. App. 150a, ¶ 31; App. 139a.

When he was three years old, the State then went through the process of terminating John's (but not his siblings') biological parents' parental rights, making him free to be adopted. App. 150a, ¶ 32. The State asked Lofton if he wanted to adopt John. He did, and he filed an adoption application. State child welfare officials wanted Lofton to adopt John, but his application was denied because of Fla. Stat. § 63.042(3). App. 150a, ¶¶ 32-34; Record 114 (Deposition of Steven Lofton, at 54-56, 60-61, 80-84).[8]

John, Franke and Tracy think of themselves as brothers and sister. They have lived virtually their entire lives with each other, and with Steven and Roger, who are the only parents they have ever had. App. 150a, ¶ 29; App. 142a, 143a; Record 145 (Declaration of Steven K. Lofton ("Lofton Dec."), ¶¶ 3-5, 7, 12.

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[7] These are the ages of the children now, adjusted from App. 142a for the passage of time.

[8] The Panel referred to a proposal by the State for Lofton to become John Doe's legal guardian. John Doe's guardian ad litem, counsel for the State, and Lofton all agreed that a guardianship would not be in John Doe's best interest because he would have lost his Medicaid coverage. App. 139a-140a.

In 1998, the Children's Home Society, the agency that placed the children with Lofton, created an award for outstanding foster parent of the year. The Society not only gave that first award to Steven Lofton and Roger Croteau, it named the honor the "Lofton-Croteau" award. App. 142a.

What Steven and Roger have given John might not seem very special. John goes to school every day and comes home to homework, chores and a family dinner. He is on the swim team. His friends come over and sometimes come along on family trips. Steven and Roger take care of him when he is sick and comfort him when he is upset. In short, John and his brother and sister lead lives fairly typical for American teenagers. Record 145 (Lofton Dec., ¶ 11).

But ordinary as this life might seem to some, it is an elusive dream to many Florida children who began life with the disadvantages John and his siblings had. So much so that even the judge who authored the Panel opinion felt compelled to write later that "one can only be impressed by the courage, tenacity and devotion" of Lofton for the children placed in his care. App. at 69a (Birch, J., concurring).

On June 22, 2001—after John had been with his family for ten years—Lofton received a phone call from John's State caseworker, who told him she was looking for someone else to adopt John. She asked Lofton if he knew anyone who might be interested. Lofton's lawyer immediately asked for the State's assurance that John would not be removed from his family. The State refused. App.137a-138a, ¶ ¶19-21; App. 151a, ¶¶ 40, 41.

The Houghton family. Plaintiff John Roe has been raised by plaintiff Doug Houghton for nearly 9 of his 13 years. Houghton is a critical care nurse. In 1994, while working at a pediatric clinic, he began seeing John as a patient. Record 112/113 (Deposition of Douglas E. Houghton, Jr. ("Houghton Dep.") (filed under seal), at 9-11,17-19).

Shortly before Christmas, 1995, when John was just shy of four, his biological father told Houghton that he was unable to take care of John, and asked Houghton to take him in. Houghton agreed, and he has been raising John ever since. Record 112/113 (Houghton Dep., at 21-22); App. 115a-116a; App. 150a, ¶ 27.

So that he could arrange for school and medical care, Houghton became John's legal guardian in March 1996. John's biological father has agreed to give up his legal status as a parent so that Houghton can adopt John. John's biological mother is dead. App. 150a, ¶ 27; App. 116a; Record 112/113 (Houghton Dep., at 24-26, 37).

According to the District Court, Houghton and John have a "deeply loving and interdependent relationship" and "emotional ties . . . as close as those between biological parents" and their children. App. 121a.[9]

Houghton had a favorable adoption home study in May 2000, but the evaluator concluded that by law, Houghton would not qualify to adopt John because Houghton is gay. App. 150a, ¶ 28.

The Smith/Skahen family. Plaintiffs Wayne LaRue Smith and Daniel Skahen have lived together in a committed relationship for eleven years. Record 52 (Amended Complaint, ¶ 27). Since this case was commenced, they have become long-term foster parents and seek to adopt a child who was placed in their permanent custody by the State. *See In the Interest of A.A.* (Fla. 16th Cir., No. DPK-00-340, Dec. 6, 2002), submitted to Eleventh Circuit pursuant to F.R.A.P. 28(j).

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[9] The District Court made the same findings about Lofton and John Doe. App. 121a.

Proceedings below

The plaintiff families filed a complaint in District Court seeking a declaration that Fla. Stat. § 63.042(3) violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. They charged that Florida's law violates the right to equal protection of lesbians and gay men who seek to adopt, and of children raised by lesbian and gay caregivers who cannot be adopted by them. The law, they say, is unconstitutional because it was enacted in order to disadvantage lesbians and gay men and it lacks even a rational relationship to any legitimate government interest. Lofton and his son, and Houghton and his son also say that the law is unconstitutional as applied to them because, by denying them the opportunity to secure their family relationships, it violates their right to family integrity.

The State moved for summary judgment, arguing that the statute was constitutional as a matter of law. It said it was possible rationally to think the exclusion could advance two State interests: 1) expressing moral disapproval of "homosexual households," and 2) promoting the best interests of children by placing them with married mothers and fathers, who it hypothesized make better parents. The State offered no evidence that gay people as a group are incapable of providing children with good homes, or that the purpose of the law was in fact to promote child welfare. Instead, it took the position that the federal Constitution allowed it to base the law on speculation.

The families responded that expressing disapproval is not a legitimate government interest. Moreover, they said, given the child welfare law and practice in Florida—the placement of children in long-term care with gay people, the fact that those known to pose a danger to children are not categorically excluded, the fact that the adoption statute allows single people to adopt and they do so in large numbers, and the lack

of any adoptive parents (let alone married couples) for so many Florida children who wait years for families—it is impossible to credit the idea that the adoption exclusion was enacted to promote children's welfare.

The District Court decision. The District Court agreed with the families that expressing moral disapproval is not a legitimate government interest. App. 127a-128a. But the court deemed the State's purpose to discriminate irrelevant since, it said, it is possible to hypothesize that the ban would promote the best interests of children by getting them placed with married heterosexual couples who "arguabl[y]" could provide a "more stable home environment, proper gender identification, and less social stigmatization." App. 129a-130a.

The Eleventh Circuit Panel decision. The plaintiff families appealed to the Eleventh Circuit. While the case was pending, this Court decided *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003). The families filed supplemental briefs. *Lawrence*, they said, holds that like heterosexuals, gay people have a protected liberty interest in forming and maintaining intimate relationships. Because the State justified its law explicitly as a preference for those who form heterosexual relationships and against those who engage in same-sex intimacy, the families said, Florida's law must be subjected to the kind of "heightened scrutiny" weighing of interests this Court did in *Lawrence*. Any form of heightened scrutiny would be fatal, the families noted, since the State relied on hypothetical justifications rather than any facts, and because an actual purpose to express disapproval of gay people fails any level of review.

The Eleventh Circuit Panel deemed rational basis review the appropriate standard for reviewing the plaintiff families' equal protection claim because it said *Lawrence* was a rational basis case. App. 21a. The Panel said it was "particularly

hesitant" to say that *Lawrence* involved a protected liberty interest because the case generated "an opinion whose language and reasoning are inconsistent with standard fundamental rights analysis." App. 19a-20a. Instead of the "careful description" of the liberty interest that the Panel said is one of the "primary features" of fundamental rights analysis, the *Lawrence* opinion invoked liberty interests "with sweeping generality." App. 20a-21a. The Panel also said *Lawrence* must be a rational basis case because the opinion did not demonstrate that America has a deeply rooted history and tradition of respecting a right to private sexual intimacy. App. 20a. Most significant to the Panel was the Court's holding, which it said was plainly based on "rational-basis grounds." App. 21a.

The Panel began its rational basis review by recharacterizing Florida's purpose to disapprove of "homosexual households" as an "interest in the promotion of public morality." App. 24a-25a. It said this Court had recently approved of that interest. App. 25a. The Panel did not consider it necessary to address the validity of that purpose since, it held, the adoption statute was rationally related to the goal of "furthering the best interests of adopted children by placing them in families with married mothers and fathers." App. 24a-25a. The Panel accepted what it admitted were the "unprovable assumptions" that married heterosexual couples are more stable, children benefit from the presence of a father and a mother, and thus, that such couples provide the "optimal family structure." App. 26a. The Panel said this is "the accumulated wisdom of several millennia of human experience." App. 26a.

Responding to the families' position that the categorical exclusion is irrational, the Panel pointed out that all parties agreed that substance abusers and child abusers, who are not categorically excluded from adopting, do not adopt if the State "determines" in individual evaluations that they pose an actual

threat to children. App. 28a. In the Panel's view, this meant plaintiffs had agreed there was no difference in treatment in fact.[10]

As for the fact that single heterosexuals are not excluded, the Panel speculated that they might eventually marry, and even if they don't, might be "better positioned . . . to provide adopted children with education and guidance relative to their sexual development throughout pubescence and adolescence," in part at least by sharing their own teenage dating experiences. App. 30a-31a.

The Panel assumed that the surplus of children waiting to be adopted might mean merely a delay in placement. App. 32a-33a. The Panel concluded that drawing the line at adoption, while otherwise placing children with gay people, is not irrational because foster care and guardianship do not have the "permanence" or the "societal, cultural, and legal significance" of adoption. App. 34a.

Perhaps attempting to supply some support for the speculation that gay people are categorically incapable of providing good homes, the Panel discussed some commentary on gay parents and the adjustment of their children, none of which the State relied upon or otherwise found its way into the record.[11] Summing up, the Panel said that it was not irrational

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[10] The Panel also pointed to a statute that bars some adoptions—of children who are in foster care—by people convicted of certain crimes. App. 28a-29a. But this statute does not apply to adoptions of other children. Fla. Stat. § 435.045; *see* Fla. Stat. § 63.202.

[11] Specifically, the Panel offered a "study" that it says shows that children of gay parents "fare differently on a number of measures, doing worse on some of them . . . ." App. 361-37a. But as the Panel was advised by an *amicus curiae* brief from the Child Welfare League of America, *et al.*, that article is the creation of Paul Cameron, whose work has been widely discredited and would not be admissible under Fed. R. Evid. 701 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993). *See Baker v. Wade*,

for the legislature to "proceed with deliberate caution" before placing children in families "not conclusively demonstrated to be the equivalent to the marital family structure." App. 38a.

Finally, the Panel turned to *Romer v. Evans*, 517 U.S. 620 (1996), which it said involved a "unique factual situation and narrow holding" that made it inapplicable to this case. App. 39a. The Panel read *Romer* to protect against discrimination based on homosexual "status" but not "conduct." App. 39a.

The en banc *Court.* Plaintiffs' petition for *en banc* review was denied by a vote of 6-6.[12] Three of the six dissenters concluded that the statute violates the Equal Protection Clause, failing even rational basis review. App. 70a (Anderson and Dubina, JJ., dissenting); 71a-72a (Barkett, J., dissenting). Judge Barkett also concluded that this Court's *Lawrence* decision required heightened scrutiny, which the exclusion could not survive. App. 72a. The other three dissenters stopped short of stating their views on the statute's constitutionality. They would have granted *en banc* review because, in their view, "there is a serious and substantial question whether Florida can constitutionally declare all homosexuals ineligible to adopt while, at the same time, allowing them to become permanent foster parents, and not categorically barring any other groups such as convicted

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106 F.R.D. 526, 536-37 (N.D. Tex. 1985) (describing Cameron's work on the effects of parental sexual orientation on children's development as a "total distortion" of the data), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985).

The only other article offered by the Panel, Judith Stacey & Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter*, 66 Am. Soc. Rev. 159 (2001), concluded that "[b]ecause every relevant study to date shows that parental sexual orientation per se has no measurable effect on the quality of parent child relationships or on children's mental health or social adjustment, there is no evidentiary basis for considering parental sexual orientation in decisions about children's 'best interest.'" *Id.* at 176.

[12] *See* note 2, *supra*.

felons or drug addicts from adopting." App. 112a (Marcus, J., dissenting (joined by Tjoflat, C.J., and Wilson, J.)).

Judge Barkett began her dissenting opinion by pointing out that the Florida statute burdens personal relationships and "exudes animus against a politically unpopular group," just like the challenged government acts in *Romer*, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). App. 73a-74a. *See also Lawrence*, 123 S. Ct. at 2485 (O'Connor, J., concurring). Because the statutory scheme is "so riddled with exceptions" to placements with married mothers and fathers, Judge Barkett concluded that the purported purpose of providing married heterosexual couples cannot "reasonably be regarded as [the law's] aim." App. 77a (quoting *Eisenstadt*, 405 U.S. at 449).

Judge Barkett pointed out that the Panel did not explain why it is rational to believe that gay people are not able to provide stable, permanent homes or to be effective role models. She noted that there is no evidence to support either idea and the facts of this case suggest otherwise. App. 85a.

Observing that Florida allows "child abusers, terrorists, drug dealers, rapists and murderers" to apply to adopt, while categorically barring gay people, Judge Barkett wrote:

> Whereas the Texas sodomy statute struck down in *Lawrence* treated homosexuals as criminals, Florida's ban on gay adoption treats criminals with more dignity than homosexuals. Nothing more clearly raises the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," than this disparity of treatment.

App. 90a (quoting *Romer*, 517 U.S. at 634).

Judge Barkett summarized the legislative history of the adoption statute, which she said shows that in fact "anti-gay animus was the major factor—indeed the sole factor—behind the law's promulgation." App. 94a.[13]

Judge Barkett also disagreed with the Panel's interpretation of *Lawrence*. "The only way to avoid the conclusion that *Lawrence* recognized a fundamental right or liberty interest that requires heightened scrutiny," she concluded, "is to deliberately refuse to give meaning to the overwhelming bulk of the words, phrases, sentences, and paragraphs used in *Lawrence*. Under the Panel's view, *Lawrence* is a one-sentence opinion with pages and pages of irrelevant *dicta*." App. 107a. Because Florida punishes the exercise of this right by excluding gay people who have intimate relationships from consideration to be adoptive parents, the law should be subjected to heightened scrutiny, which it could not survive. App. 107a-111a.

Judge Birch, the author of the Panel opinion, wrote a special concurrence addressing Judge Barkett's dissent. In his view, *Lawrence* struck down the Texas sodomy statute without "announcing a new rule of constitutional law." App. 57a. Having separated the result in *Lawrence* from its broader principles, Judge Birch then concluded that the most "judicious" course was to limit its holding "to cases involving the same facts and permit the Supreme Court to clarify the gray areas it has apparently (and perhaps intentionally) left for another day." App. 60a.

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[13] As for the Panel's suggestion that public moral disapproval is a legitimate government interest, Judge Barkett noted that this directly conflicts with *Lawrence* and *Moreno*, 413 U.S. 528. App. 88a-89a.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT REVIEW BECAUSE WHETHER THE FOURTEENTH AMENDMENT PERMITS A STATE CATEGORICALLY TO EXCLUDE GAY PEOPLE FROM CONSIDERATION AS ADOPTIVE PARENTS IS AN IMPORTANT QUESTION OF FEDERAL LAW.

That two young boys, abandoned by those who conceived them and facing the grim prospect of bouncing from home to home in foster care, will be denied adoption by the courageous men who gave them real families, based on a law enacted to drive gay people "back into the closet," should be enough to warrant plenary review.

That over time thousands of children in Florida, similarly abandoned and similarly facing a bleak future in a broken foster care system, will be denied any real childhood so that Florida may use its adoption law to tell the world that it disapproves of gay people, is clearly sufficient reason to grant *certiorari*.

Moreover, review in this case is not only appropriate but necessary to preserve the primacy of this Court's constitutional decisions. At best, the Court of Appeals profoundly misread this Court's mandate in *Lawrence* and *Romer* that government may not enact laws in order to disadvantage gay people. In doing so, it has helped to create a blueprint for effectively undermining the significance of this Court's holdings in *Lawrence* and *Romer*, a process in which a growing number of other courts have joined.

A. The Panel and Other Courts Have Disregarded This Court's Rulings in *Lawrence* and *Romer* that Government May Not Pass Laws to Express Disapproval of Gay People.

The Court should grant review because the Panel's

decision is not simply wrong, but reflects an almost complete failure to absorb this Court's rulings in *Lawrence* and *Romer* that disapproval of gay people is not a constitutionally acceptable basis for government action. *Lawrence* and *Romer* were historic milestones in American constitutional law. The Court of Appeals did not simply fail to heed them. Instead, it took pains to explain them away in detail, to create a set of interpretations that would make their holdings narrow and limited to the peculiar facts of each decision. Worse still, the Panel's decision exemplifies an emerging pattern in the decisions of lower courts.

That minimizing interpretation of *Lawrence* and *Romer* does an injustice to the parents and children who are plaintiffs here and to the thousands of Florida children waiting in foster care for a permanent home. Equally important, it threatens to strip this Court's holdings of any principled meaning and deprive them of the significance that they rightfully deserve.

In *Romer v. Evans*, this Court struck down an amendment to the Colorado Constitution that barred the State and local governments from enacting any laws or policies that prohibited discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." 517 U.S. 620, 624 (1996) (quoting Colo. Const., Art. II, § 30(b)).

This Court held that, in addition to being "a denial of equal protection of the laws in the most literal sense," Amendment 2 violated even the "conventional and venerable" principle that "a law must bear a rational relationship to a legitimate governmental purpose." *Romer*, 517 U.S. at 635. As the Court explained, "'if the constitutional conception of 'equal protection of the law' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Romer*, 517 U.S. at 634 (quoting *United States Dep't*

of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (ellipses and italics in *Romer*)). Since the exclusion from civil rights protection was "inexplicable by anything but animus" toward gay men and lesbians, this Court held, it had no connection to a *legitimate* purpose.

Without a legitimate purpose, this Court held, the exclusion "classifies homosexuals not to further a proper legislative end, but to make them unequal to everyone else. This Colorado cannot do." *Id.*

Seven years later, this Court was faced with a Texas law that made some forms of sexual intimacy a crime for same-sex couples, but not for opposite-sex couples. *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003). Texas said that it had passed the law to uphold its sense of "morality," a morality that obviously applied only to gay people.[14]

This Court could not have been more emphatic in its rejection of the Texas law and the state's attempted justification of it. The Texas law, like the Georgia law upheld in *Bowers v. Hardwick*, 478 U.S. 186 (1986), attempted to "control a personal relationship" that people have the liberty to choose "without being punished as criminals." *Lawrence*, 123 S. Ct. at 2478. The flaw in *Bowers*, this Court said, lay in its crabbed conception of the liberty at stake. The liberty protected by the Constitution allows individuals to choose to enter relationships with people of the same sex "and still retain their dignity as free persons." *Id.* at 2478. Gay people "are entitled to respect for their private lives." *Id.* at 2484.

This time using a Due Process analysis more demanding than the Equal Protection analysis used in *Romer*, this Court weighed Texas' law against the constitutional protection of

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[14] Brief of Respondent at 26-7, 42-8, *Lawrence v. Texas*, 539 U.S. 558 (2003), *available at* 2003 WL 470184.

those relationships and held the Texas law furthered no legitimate purpose that could "justify its intrusion into the personal and private life of the individual." *Id.* at 2478, 2484.

The Panel in this case went to extraordinary lengths to avoid the plain import of this Court's rulings in *Romer* and *Lawrence*.

Instead of heeding *Romer's* teaching that the purpose of rational basis review is to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law," *Romer*, 517 U.S. at 633, the Panel disregarded the undisputed record evidence that disadvantaging gay people was precisely the purpose of the law.

The Panel brushed aside Florida's own defense of the law as an expression of its disapproval of "homosexual households" by calling that purpose "an interest in promoting public morality," something it said this Court had recently approved. App. 24a-25a. The Panel thus ignored this Court's consistent rulings that a purpose to disadvantage a class of people, even if carried out in the name of morality, is not a legitimate purpose. *See Romer*, 517 U.S. at 634; *Moreno*, 413 U.S. at 534.

The Panel then held that it was entitled to accept as a "legitimate basis for legislative action" the "unprovable assumption" that gay people are, as a class, less capable than heterosexuals of providing stable homes and, as a class, less capable of giving children the education and guidance they need about intimate relationships. App. 26a. This "unprovable assumption" provides a rationale which, by assuming the incapacity of the disadvantaged group, incorporates the classification itself. Thus, the Panel ignored this Court's command that a classification can survive rational basis review only if it has a rational relationship to a purpose that is "independent" of the classification itself. *Romer*, 417 U.S. at 633; *Moreno*, 413 U.S. at 534-35.

Finally, the Panel virtually ignored the law's most glaring flaw: the complete absence of any explanation for Florida's categorical exclusion of gay people, whose parenting skills it trusts by giving them "de facto" permanent custody of children through foster care and guardianship, while permitting adoption by substance abusers and people who have committed domestic violence. A classification cannot survive rational basis review if it treats a class differently than those who are similarly situated in relevant respects. *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Consequently, a classification cannot possibly stand if it treats a class less favorably than others who admittedly pose a far greater threat to the interest it is said to be attempting to advance. Moreover, this disparity carries a serious price. Gay people, whom the State shows it trusts by placing children with them in "permanent" foster care and guardianship, are kept from providing the State's least fortunate children with the thing they need most: permanent families. No one could think this was about child welfare. *See Romer*, 517 U.S. at 635.

As for the *Romer* decision itself, the Panel said its central holding was that Colorado's amendment was unconstitutional because of the "disjunction" between its "'[s]weeping and comprehensive' classification" and the "state's asserted bases for the classification." App. 38a-39a (quoting *Romer*, 517 U.S. at 624). Since Florida's law is not as sweeping, the Panel held, "*Romer's* unique factual situation and narrow holding are inapposite to this case." *Id.* It is true that in *Romer*, it was the disjunction between the classification and the state's justifications from which this Court inferred a state purpose to disadvantage gay people. But it was that purpose, and not the discontinuity itself, that violated the Constitution. And in this case, there is no need to *infer* such a purpose; a purpose to disadvantage gay people is shown by the record evidence, the legislative history, and the State's defense of the law.

The Panel's treatment of the *Lawrence* decision is even more startling. In *Lawrence*, this Court straightforwardly explained that it based its decision on the Due Process instead of the Equal Protection Clause because a narrower equality holding might not prevent future "discrimination both in the public and in the private spheres." 123 S. Ct. at 2482. Despite that, the Panel insisted that *Lawrence* is a narrow "rational basis" decision with little meaning outside of the "limited factual situation" it involved. App. 21a.

The Panel adopted the *Lawrence* dissent's division of all due process decisions into either "strict scrutiny" or "rational basis" cases, and then says that *Lawrence* must be a rational basis case since its "language and reasoning are inconsistent with standard fundamental rights analysis." App. 19a-20a; *see Lawrence*, 123 S. Ct at 2488 (Scalia, dissenting). But the opinion in *Lawrence* uses neither the language nor the kind of holding used in conventional "rational basis" review. Despite the claims of both the dissent and the Panel, this Court did not hold that the Texas law failed minimum scrutiny for lack of a legitimate purpose. It held instead that Texas had no legitimate interest that could ". . . justify its intrusion into the personal and private life of the individual," a weighing of the state's interest against the individual's that is inconsistent with rational basis review.

The language and the approach in *Lawrence* reflect this Court's more refined analytic framework for due process "protected liberty" that uses both "strict scrutiny" and "balancing" approaches depending on the individual interests and state purposes involved and the way both are implicated. *See, e.g., Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Sell v. United States*, 539 U.S. 166, 180-81 (2003); *Youngberg v. Romeo*, 457 U.S. 307, 320-22 (1982).

Again taking a cue from the *Lawrence* dissent, the Panel said that *Lawrence* had to be a rational basis case because it

did not ask if the right involved was deeply rooted in history, and did not provide a "careful description" of the right, both of which the Court typically does when it identifies a new liberty interest. App. 20a; *see Lawrence*, 123 S. Ct at 2491-92 (Scalia, dissenting). But this Court could not have been clearer that in *Lawrence* it was not announcing a "new right" but rather applying to gay people the well established *Griswold/Eisenstadt* right to private adult intimacy. In overruling *Bowers v. Hardwick*, this Court said that the analysis used by Justice Stevens in his *Bowers* dissent "should have been controlling in *Bowers* and should control here." *Id.* at 2484. That dissent relied on *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), the same autonomy cases which, along with *Casey*, 505 U.S. 833, this Court explicitly relied on in Lawrence. *See* 123 S. Ct. at 2476-81. And this Court typically neither performs a new "history and tradition" analysis nor confines itself to narrow descriptions when it applies an established right to a new situation. *See, e.g., Troxel v. Granville*, 530 U.S. 57 (2000).

By failing to acknowledge that *Lawrence* simply applied a long-established right, the Panel found itself in the peculiar position of concluding that the "sweeping" terms this Court used to describe the liberty interest at stake in *Lawrence* meant the ruling, far from being "sweeping," was extremely narrow. App. 39a. That anomalous pronouncement is central to the Panel's decision. If the inclusive words of *Lawrence* mean what they say, and *Lawrence* requires heightened scrutiny of laws that disadvantage gay people because of their relationships, Florida's adoption exclusion must fail. For neither the State nor the Panel offered any evidence that in fact gay people are incapable of providing children with loving, stable homes. Perhaps more significant, neither the State nor the Panel could seriously dispute the evidence that the true purpose of the law was not to protect children, but to

send a message to gay people. Under heightened scrutiny, hypothetical purposes are not accepted and, as on rational basis review, a true purpose to disadvantage people is fatal. *See Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *Romer*, 517 U.S. at 633.

Some courts have faithfully followed this Court's rulings in *Lawrence* and *Romer*. *See, e.g., Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998); *Glover v. Williamsburg Local Sch. Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998); *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).[15] But the Panel is far from alone in paying them but casual regard.

The problem began the year after *Romer* with the Eleventh Circuit's *en banc* decision in *Shahar v. Bowers*, 114 F.3d 1097 (1997), *cert. den.*, 522 U.S. 1049 (1998). Ignoring the fact that the Colorado Amendment struck down in *Romer* applied to same-sex "conduct and relationships" as well as sexual orientation, the *Shahar* court said that *Romer's* "animus" holding did not apply because *Romer* was "about a person's condition" while *Shahar* was "about a person's conduct." 114 F.3d at 1110. Going on, *Shahar* made a mistake similar to the one the Panel made here. The court

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[15] In *Stemler*, 126 F.3d at 873, the Sixth Circuit held that under *Romer*, selective prosecution of a lesbian because of animus related to sexual orientation is a violation of the Equal Protection Clause. In *Weaver*, 29 F. Supp. 2d 1279, the court, applying *Romer*, held that a public school administrator's decision to fire a lesbian volleyball coach because of negative community reaction to her sexual orientation does not further a legitimate government interest and violated her right to equal protection. Similarly, in *Glover*, 20 F. Supp. 2d 1160, the court held that discrimination against a gay teacher motivated by anti-gay animus violates the right to equal protection. And in *Marcum*, 60 M.J. 198, 2004 WL 1885349, at *6, the Court of Appeals for the Armed Forces recognized that *Lawrence* required not rational basis review, but a "searching constitutional inquiry."

insisted that *Romer's* first holding—that the amendment's breadth amounted to a literal violation of equal protection—was its only holding, and that it therefore did not apply to a situation that had less than an "across-the-board denial of legal protection." *Shahar*, 114 F.3d at 1110. *Romer*, so the court put it, "is no employment case." *Id.*

Later that year, the Sixth Circuit decided *Equality Foundation v. Cincinnati*, 128 F.3d. 289 (6th Cir. 1997), *cert. den.*, 525 U.S. 943 (1998). Like the Panel here, the court in that case said that despite *Romer*, it is legitimate for government to discriminate against gay people in order to express its "moral disapproval of homosexuality." 128 F.3d at 300-301. Like the Eleventh Circuit, the court said that it was the "uniqueness" of the Colorado Amendment's "sweeping scope and effect" that made it invalid. *Id.* at 295, 297, 299.[16]

Earlier this year, the Kansas Court of Appeals followed the Eleventh Circuit's lead and suggested that *Romer* is only about "orientation" and therefore does not apply to state laws that treat same-sex sexual activity more severely than heterosexual activity. *Kansas v. Limon*, 32 Kan. App. 2d 369 (2004), *rev. granted* (Kan. May 25, 2004). Upholding a 17-year prison sentence for a teenager who had sex with another boy when he would have received no more than 15 months had his act been with a girl, the court took the same position as *Equality Foundation* and held that *Romer* permitted a state to treat gay teenagers differently to "protect the morals" of teenagers. *Id.* at 239-240.

The Panel here is also not the only court to say that *Lawrence* is effectively limited to its facts. The *Limon* court held that because *Lawrence* involved adults, it had no

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[16] The Sixth Circuit seems split internally over the meaning of *Romer*. *Compare Equality Foundation* with *Stemler v. City of Florence*, 126 F.3d at 873.

application to a case involving teenagers. *Id.* at 373-374. But this Court rested *Lawrence* on the same liberty it had upheld in *Carey*, 431 U.S. 678, and *Casey*, 505 U.S. 833, cases that held that while government has more leeway in regulating the lives of young adults, young adults do have a right to sexual autonomy.

And in *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003), a case addressing the exclusion of same-sex couples from marriage, the Arizona Court of Appeals, like the Panel in this case, accepted the insistence of the *Lawrence* dissent that *Lawrence* is a minimum scrutiny "rational basis" case. The *Standhardt* ruling is somewhat gratuitous; the court had already found that the fundamental right to marry did not apply to same-sex couples. But by saying that "such an intimate expression of the bond securing a homosexual relationship" is not a protected liberty, *id.* at 457, the decision, like the Panel's here, is helping to create a jurisprudence that destroys the central meaning of what this Court did in *Lawrence* and *Romer*. *See also Williams v. Pryor*, 378 F.3d 1232 (11th Cir. 2004) (in context of challenge to law criminalizing the sale of sexual devices, court held that *Lawrence* is a rational basis case and inapplicable to those facts).

Clearly reaffirming this Court's rulings in *Lawrence* and *Romer* would not preordain the outcome in all cases involving laws that treat gay people differently. Some laws that treat gay people differently may not have been motivated by disapproval, and some may have actual purposes that are legitimate and important. As Justice Kennedy observed in *Board of Trustees v. Garrett,*

> The failure of a State to revise policies now seen as incorrect under a new understanding of proper policy does not always constitute the purposeful and intentional action required to make out a violation of the Equal

Protection Clause.

531 U.S. 356, 375 (2001) (Kennedy, concurring). Reaffirming those holdings would, however, set the framework for deciding subsequent cases. Every case will have to evaluate the state's particular purpose. But every case should not have to litigate the proper analytic framework and standard of review.

When this Court said in *Romer* that "a bare desire to harm a politically unpopular minority is not a legitimate governmental purpose," its meaning should have been plain enough. "Classifications [may] not [be] drawn for the purpose of disadvantaging the group burdened by the law"; that rule of constitutional law applies to gay people just as it does to everyone else. Whatever the correct outcome should have been in *Equality Foundation, Shahar*, and *Limon*, their reasoning was incompatible with that central holding in *Romer*.

Lawrence itself, however, should have made the message unmistakable. *Lawrence* marked the end of the era in which the state could single out gay people for discrimination on the basis of nothing more than speculation. The decision in this case, and the opinions in *Limon*, *Standhardt* and *Williams* make it all too clear, however, that this Court's work here is unfinished.

At the very least, the diversity of views among the lower courts regarding the significance of *Lawrence* and *Romer* is an alternative basis for granting *certiorari*. *Compare Shahar*, 114 F.3d 1097; *Equality Foundation*, 128 F.3d 289; *Williams*, 378 F.3d 1232; *Limon*, 32 Kan. App. 2d 369; and *Standhardt*, 206 Ariz. 276, with *Stemler*, 126 F. 3d 856; *Weaver*, 29 F. Supp. 3d 1279; *Glover*, 20 F. Supp. 2d 1160; and *Marcum*, 60 M.J. 198, 2004 WL 1885349. *See* note 15, *supra*.

B. Florida's Use of its Adoption Law to Express Disapproval of Gay People Denies Many Florida Children Permanent Families.

What makes this case particularly appropriate for this Court's review is the cost the State of Florida is willing to pay for its statement disapproving of gay people, and the cost the Panel was willing to pay to allow it. This law sacrifices the interests of children—children who sometimes seem as abandoned by society as many of them were by those who created them. As the lives of the children who petition this Court today show, this is no abstract legal issue. As the striking number of children in Florida without families shows, this is not a problem with only parochial consequences.

Striking down this law is not a complete answer to Florida's central problem—that it has many more children in its care than it has adults willing to give them families. But it would help. And the damage here is qualitative as well as quantitative. It is no exaggeration to say that lives may be at stake here; childhoods certainly are. This Court should grant *certiorari* to make it clear once and for all that states may not pass laws to express their disapproval of gay people and most particularly may not do that on the backs of society's least fortunate.

CONCLUSION

For the reasons stated above, the Court should grant *certiorari*. In the alternative, if the Court grants review in *Miller v. United States*, No. 04-38, it should hold this case until it resolves the validity of intra-session appointments of Article III judges. *See* note 2, *supra*.

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